IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Norfolk Division)

JTH TAX, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:07-cv-00169-RGD-JEB
	)	
JEROME REED,	)	
	)	
Defendant.	)	

BRIEF IN IN OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT JUDGMENT

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PRELIMINARY STATEMENT

Defendant Jerome Reed is filing a Motion which seeks an Order enlarging the time to file responsive pleadings to the Plaintiff's Complaint and to deem the responsive pleading submitted with his motion as timely filed, in addition to a Motion to Dismiss for lack of subject matter jurisdiction. Counsel for the Defendant was retained on September 4, 2007, and Counsel is filing this motion and responsive pleading without undue delay.

Setting aside the default for good cause pursuant to Fed. R. Civ. P. 55(c) and enlarging the time for the Defendant to file a responsive pleading will not prejudice the Plaintiff and will not require the postponement of trial or negatively affect any other events already scheduled by this Court. Allowing the Defendant additional time to respond to Plaintiff's Complaint will permit this cause to be determined on the merits. As a matter of equity, after consideration of all circumstances, the Court should grant Defendant's motion and permit the enlargement of time, as prescribed by Fed. R. Civ. P. 6(b), Fed. R. Civ. P. 55(c) and Fed. R. Civ. P. 60(b).

STATEMENT OF CASE

JTH Tax, Inc., doing business as Liberty Tax Service, (hereinafter referred to as "Liberty" or "Plaintiff") initiated this lawsuit against Jerome Reed (hereinafter referred to as "Reed" or "Defendant") on or about April 12, 2007 in the United States District Court for the Eastern District of Virginia, Norfolk Division, instead of filing a compulsory counterclaim in a New Jersey case which it successfully sought to have removed to the United States District Court for the District of New Jersey. Defendant, who is unsophisticated in the law, failed to file a responsive pleading within the time period set forth in Rule 12 of the Federal Rules of Civil Procedure, believing that his New Jersey counsel was handling this matter. This matter is now before this Court upon Plaintiff's

Motion for Default Judgment.

ARGUMENT

THE COURT SHOULD NOT GRANT A DEFAULT JUDGMENT AND THE COURT SHOULD ENLARGE THE TIME FOR DEFENDANT TO FILE A RESPONSIVE PLEADING TO THE PLAINTIFF'S COMPLAINT.

Pursuant to Fed. R. Civ. P. 6(b)(2), this Court has discretion to grant an enlargement of time to permit a late filing after expiration the time period specified in Fed. R. Civ. P. 12, where the failure to act timely is the result of "excusable neglect." Excusable neglect has proven to be a flexible concept and requires an equitable inquiry into the total circumstances surrounding the late filing. Thompson v. E.I. DuPont de Nemours & Co., Inc., 76 F.3d 530, 533 (4th Cir. 1996).

The seminal case articulating the application of "excusable neglect" under Rule 6(b)(2) to a factual scenario is Gilyard v. Northlake Foods, Inc., 367 F. Supp. 2d 1008, 1010 (E.D. Va. 2005). Gilyard provides that "[u]nder Rule 6(b), where the specified period for the performance of an act has elapsed, a district court may enlarge the period and permit the tardy act where the omission is the 'result of excusable neglect.'" Gilyard 367 F. Supp. 2d at 1010 (citing Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship., 507 U.S. 380, 391, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)). In addressing the issue of excusable neglect, this Court relied on the United States Supreme Court's analysis in Pioneer, applying an "equitable weighing of factors." In Pioneer, the Supreme Court addressed the issue of allowing enlargement of time, concluding:

> the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the nonmovant, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Gilyard, 367 F. Supp. 2d at 1010-1011 (E.D. Va. 2005) (citing Pioneer 507 U.S. at 395).

Applying the Pioneer analysis adopted by this Court in Gilyard to the case at bar, it is clear the Court should grant Defendant's Motion for an Enlargement of Time. First and foremost, the excusable neglect in this case was occasioned in part, by the Defendant's lack of sophistication and confusion resulting from the two United States District Court cases filed in different venues, Virginia and New Jersey .

On or about November 20, 2006, Jerome Reed filed a Complaint against Liberty Tax Service, Inc. in the Superior Court of New Jersey Chancery Division for Middlesex County, alleging various claims arising from Liberty's breach of contract. In response, instead of filing a counterclaim in that case (which would have been compulsory upon removal of the case to the United States District Court under Fed. R. Civ. P. 13 (a)), Liberty Tax filed the current action in the United States District Court for the Eastern District of Virginia on April 12, 2007 and then **five days later** removed the New Jersey state court claim to the United States District Court for the District of New Jersey by notice of removal filed April 17, 2007. Once removed, Liberty Tax filed a Motion to Transfer Venue to the United States District Court for the Eastern District of Virginia, Norfolk Division. Plaintiff, in orchestrating these legal filings, was aware that it has created two lawsuits and that the Defendant most likely would have had New Jersey counsel file an Answer in the New Jersey lawsuit. By filing a second lawsuit in Virginia, Plaintiff apparently sought to deprive Defendant of the benefit of counsel to defend. Defendant's New Jersey counsel advised Defendant to seek Virginia counsel, but did not advise him that an Answer was needed in the Virginia case, and discussed with Liberty's counsel a consolidation of these cases when the New Jersey case would be transferred to Virginia. As a result, there is and has been no danger of prejudice to the Plaintiff. See United States v. Borromeo, 945 F.2d 750, 754 (4th Cir. 1991) (discussing that perhaps the most important factor for the court to consider in a Fed. R. Civ. P. 6(b) (2) Motion, is the degree of prejudice to the non-moving party. (reversing a denial of a Fed. R. Civ. P. 6(b)(2) Motion as abuse of discretion)).

Reed's New Jersey counsel and counsel for Liberty continued negotiations for a stipulation and agreed order transferring the New Jersey action to Virginia. Upon transfer, the parties anticipated the New Jersey matter would be consolidated with the case at bar. Liberty's corporate counsel confirmed this understanding by letter dated June 29, 2007 to the clerk's office in Virginia. Ultimately, by Order dated August 20, 2007, the United States District Court for the District of New Jersey granted Liberty Tax's Motion to Transfer Venue to the Eastern District of Virginia, Norfolk Division. To the best of Defendant's knowledge, information, and belief, this case has not yet been received by this Court.

Liberty Tax is not prejudiced by receiving the Defendant's responsive pleading at this time, as it was fully aware of the events associated with Mr. Reed's claims before filing this action. Even if it were not aware, the danger of prejudice to the Plaintiff is negligible or non-existent since no aspect of the trial process itself would be directly affected.

Second, the length of delay in filing will have little or no impact on the current judicial proceedings. Based on the allegations Mr. Reed made in his initial complaint filed in New Jersey state court, Defendant was fully aware of the circumstances surrounding this dispute before initiating the current action and could easily anticipate Mr. Reed's defense. Allowing the Defendant additional time to respond to Plaintiff's Complaint will permit this cause to be determined on the merits, will have no affect on matters already scheduled by the Court, and will cause no delay in judicial proceedings.

Finally, Defendant has acted in good faith, believing the matters would be consolidated upon transfer from the New Jersey District Court. Defendant's counsel submitted the Motion for Enlargement of Time on behalf of the Defendant, along with this brief in support and responsive pleading upon being retained.

CONCLUSION

The law favors disputes being tried on the merits of the action, and the circumstances of this case justify that the Court not enter a default judgment and that the Defendant be granted an enlargement of time to respond to Plaintiff's Complaint. There is no prejudice to the Plaintiff, and granting Defendant's motion will not negatively affect the judicial proceedings. Consequently, the Court should grant the motion and Order that the responsive pleading already filed with the Court be deemed timely.

JEROME REED

By_________/s/_______________

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of September 2007, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the Following:

Vanessa Mercurio Szajnoga, Esq.,
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And I hereby certify that I will also fax the document to

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/s/

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